IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Union of India & others Vs. Ex Lans Nayak Bega Ram

D.B.CIVIL SPECIAL APPEAL(WRIT) NO.459/2007
UNDER RULE 134 OF
THE RAJASTHAN HIGH COURT RULES, 1952.

Date of Judgment: September 27, 2007

P R E S E N T

HON'BLE MR.JUSTICE P.B.MAJMUDAR
HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.Vineet Mathur, Sr.Standing Counsel, for Union of India.
Mr.S.K.Nanda, for the respondent.

REPORTABLE BY THE COURT: (PER THANVI J.)

1. This Special Appeal by Union of India is directed against the judgment of the learned Single Judge whereby while allowing the writ petition of respondent Ex Lans Nayak Bega Ram, he quashed the proceedings of summary Court Martial dt.23.9.1992 and ordered to make payment of Rs.30,000/- as compensation

in lieu of six months' rigorous imprisonment & dismissal, with order of reinstatement and all consequential service benefits.

2. In the writ petition, it is stated that the respondent joined Indian Army on 27.9.1983 and was serving in the 4th Battalion of Rajputana Rifles as Lans Nayak. On 13.9.1992 when the respondent was ordered by Sub Jai Karan Singh of the Unit to leave immediately at 2100 Hrs for patrolling duty at 5 A.P., he picked up his loaded rifle, cocked the same & threatened to shoot him by uttering the following words "Who the hell are you to tell me, I will shoot you". The chargesheet was issued to the respondent and summary court martial was held, whereby he was awarded six months' rigorous imprisonment with the order of dismissal from service on 23.9.1992. His appeal and representations were also rejected. Thereupon, he filed a writ petition under Article 226 of the Constitution of India before this Court, wherein the learned Single Judge while setting aside the punishment awarded to the respondent, held that the summary court martial was conducted in violation of Rule 115(2) of the Army Rules, 1954, hereinafter referred-to as "the Rules". While relying upon the decision of the Division Bench of this Court in Union of India v. Ex Sepoy Chander Singh reported in 1997(6) SLR 643 and also the judgment of Jammu & Kashmir High Court in Prithpal Singh v. Union of India reported in 1984(3) SLR 675,

the learned Single Judge came to the conclusion that non-compliance of the mandatory provisions of Rule 115(2) of the Rules to the extent by not getting the plea of guilty signatured by the accused, amounts to violation of Article 14 of the Constitution and passed the impugned judgment, which is under challenge in this appeal.

3. Mr.Vineet Mathur, learned Senior Standing Counsel for the Union of India has vehemently argued that the learned Single Judge has grossly erred in relying upon the judgment of Ex Sepoy Chander Singh's case (supra). According to him, the provisions of Rule 125 of the Rules have not been taken into consideration in this case, which prescribes a procedure to be applied while conducting summary court martial. In this rule, it is clearly stated that if the court martial proceedings are signed at the last, it is not obligatory on the part of the Sentencing Authority to sign on each paper. That apart, a certificate has also been appended in compliance to Rule 115(2) of the Rules, which was not accepted by the learned Single Judge, therefore, the judgment in Chander Singh's case is per incuriam. He has placed reliance upon the judgment of Madhya Pradesh High court in Ismail Khan v. General Officer Commanding-in-Chief reported in Mil LJ 2004 MP 55 wherein it has been held that the High court in its writ jurisdiction, cannot sit as a court of appeal upon the

finding of the summary court martial. That was a case where the allegation against the army man was with regard to absence from duty for 98 days with two earlier absence of 34 days and 39 days respectively. His dismissal from service & rigorous imprisonment of two months was not treated to be either too severe or shockingly disproportionate. In our view, the learned Single Judge rightly observed that this citation is absolutely misplaced for the reason that the Madhya Pradesh High Court rightly declined to interfere in the question of fact in its exercise of powers under Article 226 of the Constitution by way of judicial review. There was no question involved in that case for non-compliance of the statutory provisions contained in the Army Rules. The contention of the learned counsel for the Union of India that the judgment in Chander Singh's case (supra) is per incuriam, is devoid of force. A judgment is said to be per incuriam, when it is against the statutory provisions or law of precedent based on the doctrine of stare decisis. Merely because, a particular provision of law has not been discussed in the judgment, it cannot be termed as per incuriam.

4. On the contrary, Mr.Nanda learned counsel appearing for the respondent Lans Nayak has placed much reliance upon the decision of Chander Singh's case (supra) in which the Special Leave Petition filed by the Union of India was dismissed by the

Hon'ble Supreme court and submitted that the Division Bench of this Court in Chander Singh's case (supra) has rightly held the compliance of Rule 115(2) of the Rules as mandatory and this Court, if takes a contrary view, should refer the matter to the larger Bench, as the facts of Chander Singh's case with regard to interpretation of Rule 115(2) of the Rules are squarely covered with the legal position involved in the present case. According to him, neither the respondent nor the Court Martial has signed about the guilty plea in accordance with the relevant rule.

5. We have gone through the judgment of the Division Bench of this Court in Chander Singh's case (supra) in which the provision of compliance of Rule 115(2) of the Rules, was made mandatory. The Division Bench of this Court in the above case also looked into the original record and came to the finding that the guilt recorded by the officer incharge, alleged to have been made by the respondent, does not even bear the signatures of the respondent. In such a case, the sanctity of such information becomes doubtful. However, the Court also observed that in matters like Disciplined Forces, it requires special consideration irrespective of the other procedural laws including the principles of natural justice.

6. We have also examined the record of this case in the light

of the statutory provisions contained in the Army Rules. From the perusal of the summary proceedings record, it is clear that in part `B' of the proceedings, which deals with the arraignment about questions to the accused on charges, the reply has been recorded about plea of guilty in positive but thereafter the Column regarding compliance of Section 115(2) of the Rules is blank. It is neither signed by the respondent nor by the Incharge Court Martial. Ofcourse, a separate certificate has been affixed in the following form on a white sheet by the Commanding Officer, who conducted the enquiry:

"CERTIFICATE

It is certified that the accused has been explained the meaning of charge and he understands the nature of charge to which he has pleaded guilty. The accused is informed of the difference in procedure which will be followed consequent to his plea of guilty.

Sd/-
(K S Dalal)
Colonel
Commanding Officer
4 RAJ RIF
The Court"

Whereas Rule 115(2) of the Rules reads as under:

"115. General plea of "Guilty" or "Not Guilty".-(1) xxx

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but before it is

> recorded, the court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty."

7. A bare reading of this Rule provides that before recording the plea of guilty, the Court Martial shall ascertain the following factors (i) that the accused understands the charge to which he has pleaded guilty; (ii) He shall also inform him of the general effect of that plea; (iii) in particular, of the meaning of the charge to which he has pleaded guilty; (iv) of the difference in procedure which will be made by the plea of guilty; & (v) shall advise him to withdraw that plea if it appears from the summary of evidence or otherwise that the accused ought to plead not guilty. Keeping in view the language used in Rule 115(2) of the Rules, the certificate which is appended or affixed, is silent on two counts, out of the above five, firstly, the accused was not informed about the general effect of the plea of guilty and secondly, about advising him to withdraw that plea, if it appeared from the summary of evidence or otherwise that the accused ought to plead not guilty. The satisfaction or ascertainment of the Court Martial Incharge on these five factors, is coupled with the word "shall", which are lacking in the

certificate attached with the summary proceedings on a separate sheet. When the mandatory requirement of the language used in Rule 115(2) of the Rules is lacking in the Certificate and the Summary form, dealing with the certificate, is blank & unsigned by both Commanding Officer and the respondent, the necessary inference which can be drawn is that the mandatory requirement of Rule 115(2) of the Rules was not complied with, which the Summary form itself says that it is not only required to be complied with but the fact that this has been done, should also be recorded.

8. The contention of learned Senior Standing Counsel for Union of India that Rule 125 should be read with Rule 115(2) of the Rules, is devoid of force. The language of Rule 125 of the Rules pertains to signature on the sentence part which shall have authenticity of the whole of the proceedings. The sentence part is on page `J' of the Summary proceedings. Had this interpretation been taken to be correct, then why the Court martial signed on other pages like `A', `C', `D', `E', `F', `G',`H', `I' & `J'. The only page which is unsigned is page `B' and it is the most important page dealing with the charge and the plea. Though while sitting in appeal, we cannot comment on the finding of this fact as to whether this certificate has been affixed afterwards or not but if we look at the certificate for

compliance of Rule 115(2) of the Rules and page `B' of Summary proceedings pertaining to charge & guilty plea, it clearly appears that compliance of Rule 115(2) has not been made, which is mandatory requirement of the law. Learned Single Judge has rightly held to the extent that not obtaining signature of the respondent on the "plea of guilt", amounts to violation of Article 14 of the Constitution. In the present case, this plea is not only unsigned by the accused and the Court Martial but this is blank also, which can safely be termed as departure from the mandatory requirement of Rule 115(2) of the Rules. The natural corollary of the said non-compliance amounts to setting aside the order of dismissal and punishment which the learned Single Judge has rightly done in the petition.

9. However looking to the gravity of the charges against a member of the Armed Forces, which are disciplined ones, whether it will be justiciable for the court to order his reinstatement with all consequential benefits or to remit the case for fresh trial?

10. Keeping in view the peculiar facts of the case in which the respondent while he was asked to leave at a particular time for duty of patrolling, he picked up his loaded rifle, cocked the same and threatened to shoot his superior, we feel that it is a case of

serious charge against a member of the Armed Force, whose duty was to protect the Nation from external aggression with his rifle rather than to use it against his own superior. The procedure laid down in our Criminal Justice System is that accused is presumed to be innocent, unless the guilt is proved beyond any shadow of doubt but in the Court Martial proceedings, which are of summary nature, the Parliament thought it proper to deviate from it by enacting the separate law and procedure for the Armed Forces on whose shoulders, our democratic system rests against the eye of enemy, as they are Command Forces. Whatever directions & orders are issued by the superiors in Command Forces, are to be obeyed by their subordinates as a law. Therefore, the Austin rightly supposed that "Law is a command which is to be obeyed and we are bound to obey it". This source of law calls our conscience not to allow such member of the Armed Forces to serve any more or take benefit out of it.

11. That apart, looking to the factum of incident to be 15 years old and also attaining superannuation age by the respondent Lans Nayak, it will be a futile exercise to remand the case for re-trial, especially when the most of the witnesses might have, by now, retired. Therefore, we deem it proper to maintain the finding of the learned Single Judge with regard to quashing of

the dismissal order. So far as reinstatement and consequential benefits vis-a-vis award of compensation in lieu of six months' rigorous imprisonment is concerned, we would like to depart from this part of the order in the petition for the reasons as stated above. We feel that discipline and morale, which is the touchstone of the Armed Forces, has been tried to be polluted by the respondent and the justice system cannot ignore the factum of its consequential result in remanding the matter with the efflux of time as indicated above. Therefore, in the given case, which is a little bit departure from the normal course, it will be a travesty of justice, if such indisciplined personnel is granted reinstatement and consequential benefits. By doing so, we have to reconcile the justice on one hand and morale & discipline in the Armed Forces on the other hand because the defiance of discipline in the Armed Forces may cause threat to the sovereignty & integrity of the nation, which is contained in the preamble of our Constitution and no law is above it. If on technical grounds, justice system travels beyond the purview of preamble, it may uproot the very foundation of our basic structure.

12. Therefore, we deem it proper that inspite of non-compliance of the mandatory provisions of the Army Rules, it will not be appropriate to remand the case for re-trial. But when a

case is not being remanded, while sitting as a court of appeal, we deem it proper to maintain the order of quashing dismissal without any directions for reinstatement and consequential benefits. Likewise, the respondent has already undergone six months' rigorous imprisonment and he has been awarded an amount of Rs.30,000/- as compensation. Since we have set aside the order of respondent being found guilty and also not ordered for re-trial of the case, the tragedy of six months' rigorous imprisonment suffered by the respondent rightly or otherwise, is required to be compensated by exceeding the compensation amount from Rs.30,000/- to Rs.1,00,000/-, keeping in view the time factor and the present value of the currency.

13. Learned counsel for the respondent has also urged that he is out of job for last fifteen years and because of his dismissal, he has not been provided-with any job even by Government and Non-governmental Organizations as an ex service man, therefore, the Court should also take into account this humanitarian consideration for the livelihood of the respondent. We feel that this contention of the learned counsel is genuine and, as such, it is ordered that when the penalty of dismissal has been set aside, it has no bar in re-employment of the respondent in any Organization other than the Armed Forces, if he is

otherwise eligible as an ex service man.

14. Accordingly, we partly allow the appeal. While maintaining the order of the learned Single Judge with regard to quashing penalty of dismissal, we modify the order of compensation to be paid to the respondent from Rs.30,000/- to Rs.1,00,000/- and set aside the finding with regard to reinstatement in service and consequential benefits. Cost is made easy.

(DEO NARAYAN THANVI), J. **(P.B.MAJMUDAR), J.**

RANKAWAT JK, PS